

**THE STATE**

**Versus**

**SHADRECK MUTOMBENI**

IN THE HIGH COURT OF ZIMBABWE  
MOYO J  
BULAWAYO 22 NOVEMBER 2022

**Criminal Review**

**MOYO J:** The accused in this matter was convicted of 3 counts, the 1<sup>st</sup> and 3<sup>rd</sup> being of robbery as defined in section 126 of the Code. The 2<sup>nd</sup> count being of rape as defined in section 65 of the Code. He was sentenced to an effective 9 years imprisonment.

The facts of the matter on count 1 are that on the 23<sup>rd</sup> of February 2022 at around 11:00 hours, the complainant and her niece Pretty Nyoni were walking home when, at a bushy area near CSC Willsgrove Compound, the accused person suddenly appeared from the bush just behind them and grabbed the complainant by the collar of her blouse, brandished an unspecified Okapi knife and grabbed and pulled off her black leather satchel in which there was a Samsung J8 cellphone. He took the satchel and the cellphone and ran after Pretty Nyoni, who fled.

On the 2<sup>nd</sup> count, the state outline alleged that on the 23<sup>rd</sup> of February 2022, at around 11:20 hours, the complainant was walking home alone when at a bushy area near the CSC Willsgrove Compound, she met the accused person who brandished an Okapi knife and demanded for a cellphone from the complainant. The complainant tried to run away but was caught instantly, tripped and slapped twice before she was force marched further into the bush away from the path where she was forced to take off her clothes. The accused also removed his pair of trousers and raped the complainant 4 times without protection.

On count 3, the allegations are that, on the 23<sup>rd</sup> of February 2022 at around 16:00 hours, after the accused had raped the complainant in a bushy area near the CSC Willsgrove Compound, Umguza as in count 2 above, he took complainant's loaf of bread, 2 litres opaque beer, 375mls sachet of mahewu, US\$1 cash, ZWL40,00 cash and walked away. The accused person in his defence outline stated that he spent the 23<sup>rd</sup> of February at the mine and he was in the company of 3 other people. On the 27<sup>th</sup> of February 2022, he woke up from home and

he was with one Mobi wherein they decided to go to CSC Compound because they wanted to see someone who owned a mine there. They got there and at the 1<sup>st</sup> house someone queried why he was in possession of a catapult. This person asked if all was well and the accused person said all was well. They passed the first house and as they headed for the 2<sup>nd</sup> house apparently this is where this person they were looking for allegedly lived. That is when he heard about 6 – 7 people making noise but he was not unsettled because he had not done anything wrong. They called him from a distance. He went to them and they asked him where the knife which he had used to hurt people was, they suggested that they wanted to search him. They did not find any knife but they started assaulting him. When he was arrested the complainants in the 3 counts were not even there. A lady came and told his assailants that they should have waited for the complainants to positively identify the accused otherwise they would end up assaulting the wrong person. The complainants were called and they identified the accused as their assailant. They assaulted the accused and tore his clothes. They then took him to the police station.

First to testify was the complainant in the 2<sup>nd</sup> and 3<sup>rd</sup> counts, that is, rape and robbery. She told the court that she had been sent to buy groceries at about 3pm she said she was robbed and raped. It is the identification of the accused by this complainant that is of interest to this court. During her evidence the following came out *vis-à-vis* accused's identification.

1. She only saw his forehead as he wore a mask and a hat.
2. She told the court that she identified the accused because he was frowning. She said when he robbed and raped her he was frowning and when they arrested him he was frowning again. Asked for further description she said that his face was smooth.

As to how he was apprehended, she said she found him already apprehended. She said after having found him apprehended she identified him and they took him to the police.

She said at the scene she identified him by his clothes as he still wore the same clothes that he wore when he raped her. She said he wore a black mask, black shirt, a black trousers and black shoes. She said the T-shirt he wore was red and branded with a V on the arm. She said she could only identify his forehead.

Under cross-examination she said accused did not wear the same shoes on the day of his arrest, as he now wore red push-in slippers. The accused asked her why it was stated that

when he was arrested he wore black tennis shoes and she said she did not know. She said when accused was arrested he was no longer wearing a hat. Asked about accused's identification that is peculiar features, she said nothing other than that he had a large penis. She said she could identify him because if you are wronged by someone you can never forget them. At page 16 of the record of proceedings she was asked to describe the frown during cross-examination but she only said he was frowning like somebody who is angry.

What came out clearly from this testimony is that this complainant did not know any identification features of her assailant. She failed dismally to give a detailed description of her assailant and how she then identified him on the date of his arrest. She said she identified him by the clothes he wore on the date he committed the offence but what clearly came out during cross-examination is that he had no hat on the date of arrest, neither did he wear black shoes, he now wore red push-in slippers. He also no longer wore a jacket. She merely insisted that if someone assaults you, you can recognize them. There is nothing peculiar about the frowning she continually referred to. The immediate question is, if he no longer wore exactly the same clothes, how could his clothes link him to the commission of the offence?

Berita Banda is the guardian to the complainant. She said complainant told her that she was raped by someone she did not know but that she identified him by the clothes he wore. She said the complainant told her that accused wore a black trousers, a black T-shirt with red prints on the arms and a black hat. This witness could not remember the colour of the mask. They were then called after accused had been apprehended and complainant said that he is the one. She said that accused was arrested because of the clothes he wore. Interestingly, this witness does not talk about any frowning which complainant said was the main identification feature. In fact the clothes as described by this witness are the same clothes that complainant had described about her assailant but she already knew from the complaint's own testimony that what her assailant wore and what accused wore were different in that on the day of the commission of the offence her assailant wore a black hat and yet accused had no hat on the day of arrest and on the date of the commission of the offence accused allegedly wore black shoes which is not what he wore on the date of his arrest. So he could not have been identified by his clothes.

The complainant in count 1, stated that he robbed her and she saw his eyes. She said his eyes are reddish and that he has big eye lashes and eyebrows. She also mentioned his height and body structure. He allegedly wore a black mask, a black hat, a black T-shirt, a black jacket, a black trousers and black tennis shoes. She was also called to identify him once he had been arrested. She also confirmed that accused when arrested now wore a black trousers, black T-shirt and push-in slippers. Pretty Nyoni was with the complainant in count 1 and she was asked to describe accused's clothes that he wore on the date of the commission of the offence she said that he wore the same clothes that he wore on the date of his arrest. She said he was frowning and the T-shirt he wore had some red prints. She also stated that his mask dropped and she saw his face. She was called to identify the accused after he had been apprehended. She said she identified him by his face but she could not tell the court the facial features that made accused identifiable during and after the commission of the offence. This witness failed dismally to give any meaningful identification features of the accused.

Alfred Dlamini is a brother to the complainant in the 2<sup>nd</sup> and 3<sup>rd</sup> counts. He told the court that he asked the complainant to describe her assailant to him so that if he happens to meet the person he may be able to identify him. He said complainant told him that accused wore a black T-shirt with red prints and that he was tall and dark and was frowning. He said complainant told him that she could see the whole face because he was not wearing a mask. He said she said the accused was frowning but she did not describe the frown to him. He said 4 days later he saw the accused and apprehended him and her sister came and identified him as the culprit. He said he suspected accused to be the assailant because of the clothes he wore and his face. He said he noticed the clothes by the colour. He said he suspected him to be the culprit because complainant told him he was dark in complexion and had a beard. He was asked under cross-examination that complainant told the court that he wore a mask but Alfred was saying he did not have a mask, he answered in saying, he was told that he was not wearing a mask.

There are problems with the identification evidence warranting that accused should have been discharged at the close of the state case as clearly, no *prima facie*, case was established against him. For these reasons I will not analyse the defence save to comment that accused maintained his innocence and even called defence witnesses to prove his alibi which the state never sought to disprove at all.

The complainant in the 2<sup>nd</sup> and 3<sup>rd</sup> counts said accused wore a hat and a mask and that she only saw his forehead and the frowning. Other than the clothes, nothing else was stated. However, Alfred says complainant told him that accused had no mask, he was dark and had a beard. This description was never given by the complainant at all. It is Alfred's description.

Pretty Nyoni said accused's mask fell off but never spoke of seeing him with a beard. She just stated that she saw his face, no peculiar features. So if Alfred identified accused by a beard, there is obviously something seriously wrong there. He used a beard that was never seen by any of the complainants. Not only did the complainants fail to give peculiar features of the accused that would help link him to the counts but they also failed to state why they were convinced that it was him that Alfred pointed to. It is also clear that the shoes he wore on the date of arrest were different. He also did not have a hat. There are no peculiar features of the clothes that were given other than that the T-shirt had red spots on the sleeves.

It is common cause that accused allegedly wore a jacket on the date of the commission of the offence. So we are not told how the sleeves and the red marks were seen. The identification of the assailant in this case was not given properly to the extent that it is not of any probative value. In fact Alfred identified the assailant using information that he never got from the complainant who was his sister. The complainant simply came after the accused's apprehension and said yes it is him. She failed to give meaningful identification features in court. The different complainants spoke to different features with the complainant in counts 2 and 3 stating that she saw the frowning but the other witness said she saw big eyebrows and eyelashes. Alfred spoke of a beard. The clothes he wore on the day of arrest have not been shown or described beyond a reasonable doubt to be the same he wore on the 23<sup>rd</sup> of February. His alibi was not disproved yet it was supported by the defence witnesses. There is a clear doubt in this case and it cannot be held that the state proved its case beyond a reasonable doubt here.

The trial court fell into the error of dwelling on all that was common cause, that the complainants were raped or robbed by a person wearing black clothing, all that is common cause, what the trial court had to resolve was whether the accused person in the dock is the person whom the complainants saw on the 23<sup>rd</sup> of February and why. The trial magistrate did not assess the defence evidence at all. He merely made a sweeping finding that the state

managed to disprove accused's alibi. How the court arrived at this conclusion remains a mystery as the Investigating Officer was not called to tell the court that indeed they pursued accused's alibi and found it not to exist. The trial court made no finding totally ignoring the evidence of the defence witnesses who vouched for the accused person's alibi. The trial court put too much weight on the colour of clothes. How many people have a black T-shirt, a black jacket, black shoes and a black trousers and hat? In fact accused was never proven to have a black hat and black shoes as well as a black jacket as he did not wear such clothes on the date of his arrest. Neither were such clothes recovered from his home. How does a man with red shoes, a black and red T-shirt and a black trousers become the same man who wore, a black hat, a black mask, a black T-shirt, a black jacket, a black trousers and black shoes? There are no similarities there. Not only are there problems on the different features given by the state witnesses who saw the assailant but there is also a problem that Alfred had his own description of the assailant that he attributed to her sister but which description her sister never gave to the court. So in other words Alfred identified the assailant on the basis of information that never came from the complainant, the beard in particular as black clothes could not be of any probative value.

It is for these reasons that I would not confirm these proceedings as being in accordance with real and substantial justice. In fact they amount to a miscarriage of justice. This is worsened by the fact that accused did not even wear such clothes and the black clothes also did not have any peculiar features described to the court. In any event, there is no conviction that can be sustained solely on the basis of clothes. There must be other identification features peculiar to the accused person that the complainants describe to the court. Here there was none at all.

I accordingly make the following order:

The verdict by the court *a quo* is set aside and substituted with the following:

1. The accused person is found not guilty and is acquitted.

Makonese J ..... I agree